

A CONSOLIDATED PUBLIC HEALTH LAW IN INDIA: THE NEED OF THE HOUR

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ABSTRACT

The recent outbreak of the corona virus disease has affected most nations around the globe, and India is no exception. The outbreak and rapid spread of the virus has left the nation desperately in need of a strong legislative framework within which expeditious and effective measures can be taken to curb the spread of the pandemic, while also attending to the welfare of the general public. In status quo, the laws being used to regulate the government's response to the scenario are archaic, dissipated and inadequate. The Epidemic Diseases Act, 1897 and the Disaster Management Act, 2005 facilitate a major asymmetry in the power balance between Central and state authorities. The want of an overarching public health law in India has resulted in immense ambiguity regarding the measures to be taken to contain the catastrophic pandemic, and steps taken so far are not adequate as per the standards laid down by the World Health Organisation.⁹⁷⁶ It is herein suggested that a consolidated public health law will take India a long way in combating the effects of public health crises – present and future.

INTRODUCTION

The wealth and strength of a nation rests upon the health of its people. The status of public health at any given point of time affects various other aspects of the nation's overall wellbeing, including its economy, industries, employment, education, position in the international sphere and so on. Therefore, any sufferance in terms of health on a national level is a cause for immense concern. One such example of the most current public health challenge is the recent outbreak of the COVID-19 pandemic on an unprecedented scale, which has left the entire nation, as well as most of the world at large, struggling to find a solution. COVID-19 is a respiratory disease caused by the novel coronavirus or SARS-CoV-

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⁹⁷⁶Niharika Sharma, *India's swiftness in dealing with Covid-19 will decide the world's future, says WHO*, QUARTZ INDIA (Mar. 24, 2020), <https://qz.com/india/1824041/who-says-indias-action-on-coronavirus-critical-for-the-world/>.

2. Having affected 63,97,294 people globally as on 4 June 2020,⁹⁷⁷ the rapidly spreading virus has been declared by the World Health Organisation (WHO) in January 2020 as a public health emergency of international concern,⁹⁷⁸ and later on 11 March 2020 as a global pandemic.⁹⁷⁹ The rate of spreading of this virus is alarming, with 3,33,255 affected cases and 9,542 deaths in India alone as on June 15, 2020, 11:12 GMT.⁹⁸⁰ Given its proximity to China, the country of origin of the virus, India has been compelled to take stringent measures to contain the virus, such as closing borders and restricting movement even within the country. No vaccine or specific curative treatment has yet been found for COVID-19.⁹⁸¹ Given the high rate of transmission, the country has been placed under a nation-wide lockdown starting on 24 March 2020,⁹⁸² and repeatedly extended, to be observed along with social distancing. With all non-essential services being suspended, the country has faced a severe backlash in the spheres of economy, employment, education and personal wellbeing, along with other adverse effects. The rates of domestic violence have surged drastically,⁹⁸³ employees have been laid off with companies being forced to downsize,⁹⁸⁴ migrant workers are finding themselves unable to return to their native places,⁹⁸⁵ educational instruction is being imparted digitally and examinations have either been rescheduled, or cancelled.⁹⁸⁶

⁹⁷⁷ Retrieved from: <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>.

⁹⁷⁸ Anon., *COVID-19, a pandemic or not?*, THE LANCET (Mar. 13, 2020), [https://www.thelancet.com/journals/laninf/article/PIIS1473-3099\(20\)30180-8/fulltext](https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(20)30180-8/fulltext).

⁹⁷⁹ Domenico Cucinotta & Maurizio Vanelli, *WHO Declares COVID-19 a Pandemic*, PUBMED.GOV (Mar. 19, 2020), <https://www.ncbi.nlm.nih.gov/pubmed/32191675>.

⁹⁸⁰ Retrieved from: <https://www.worldometers.info/coronavirus/country/india/>.

⁹⁸¹ Anon., *How dangerous is the new coronavirus?*, ALJAZEERA (Feb. 20, 2020), <https://www.aljazeera.com/news/2020/02/dangerous-coronavirus-200205205234883.html>.

⁹⁸² Jeffrey Gettleman & Kai Schultz, *Modi Orders 3-Week Total Lockdown for All 1.3 Billion Indians*, THE NEW YORK TIMES (Mar. 24, 2020), <https://www.nytimes.com/2020/03/24/world/asia/india-coronavirus-lockdown.html>.

⁹⁸³ Aviva Parvez Damania, *Lockdown and rise in domestic violence: How to tackle situation if locked with an abuser*, THE INDIAN EXPRESS (May 17, 2020, 11:05 AM), <https://indianexpress.com/article/lifestyle/life-style/lockdown-rise-of-domestic-violence-how-to-tackle-situation-if-locked-with-abuser-national-commission-for-women-6406268/>.

⁹⁸⁴ Anon., *Side-effects of lockdown: Anxiety levels up among employees as appraisals get delayed, job loss fears rise*, THE ECONOMIC TIMES (Apr. 12, 2020, 12:28 PM), <https://economictimes.indiatimes.com/jobs/side-effects-of-lockdown-anxiety-levels-up-among-employees-as-appraisals-get-delayed-job-loss-fears-rise/articleshow/75105112.cms?from=mdr>.

⁹⁸⁵ Prashasti Singh, *Covid-19 lockdown: Migrant workers returning to native places face hurdle at Delhi-UP border*, HINDUSTANTIMES (May 17, 2020, 8:10 AM), <https://www.hindustantimes.com/india-news/migrant-workers-returning-to-native-places-face-hurdle-at-delhi-up-border/story-FXhNhU4vfMzhXEeqhWCHjN.html>.

⁹⁸⁶ Dr Ashwini Kumar Sharma, *COVID-19: Creating a paradigm shift in India's Education System*, THE ECONOMIC TIMES (Apr. 15, 2020, 8:14 AM), <https://economictimes.indiatimes.com/blogs/et-commentary/covid-19-creating-a-paradigm-shift-in-indias-education-system/>.

It is evident that it is not merely those who have tested positive for the virus who have been affected; rather it is the economy, the citizens, the nation and the world at large. It is of the utmost urgent importance that the virus is contained at the earliest, and that the society and the economy are brought to as stable a position as is possible given the circumstances. It is during this trying time that public health must be one of the foremost national interests the India must turn to the law to provide better health, safety, security, direction, guidance and refuge.

CONSTITUTIONAL UNDERPINNING OF HEALTH RIGHTS IN INDIA:

JUDICIAL DISCOURSE, AND THE RIGHT TO LIFE AND HEALTH

A multitude of judgements by the Supreme Court and various High Courts in India have iterated the importance to be given by the State to public health. The Constitution incorporates provisions guaranteeing everyone's right to the highest attainable standard of physical and mental health.⁹⁸⁷ This becomes doubly significant in trying times of a public health crisis such as the COVID-19 pandemic. As enshrined within the chapter on Fundamental Rights, as per Article 21 of the Constitution of India, "No person shall be deprived of his life or personal liberty except according to procedure established by law."⁹⁸⁸ The judiciary has interpreted the right to health in many ways through public interest litigations as well as litigation arising out of claims that individuals have made on the State, with regard to health services.

In a historic judgment in the case of *Consumer Education and Resource Centre v. Union of India*⁹⁸⁹, the Supreme Court held that the right to health and medical care is a fundamental right under Article 21 of the constitution as it is essential for making the life of a workman meaningful and purposeful, having dignity of person. It has also been established by the Supreme Court in the case of *State Of Punjab & Ors v. Mohinder Singh Chawla Etc.*⁹⁹⁰ that since the right to health is integral to the right to life, the government therefore has a constitutional obligation to provide health facilities.

Earlier in *Vincent Panikulangara v. Union of India*,⁹⁹¹ the Supreme Court of India on the right to health care observed: "Maintenance and improvement of public health have to rank

⁹⁸⁷K Mathiharan, *The fundamental right to health care*, Vol. 11 No. 4 (2003).

⁹⁸⁸INDIA CONST. art. 21.

⁹⁸⁹AIR (1995) 3 SSC, 42.

⁹⁹⁰(1997) 2 SCC 83.

⁹⁹¹AIR 1987 SC 990

high as these are indispensable to the very physical existence of the community[...] Attending to public health in our opinion, therefore is of high priority – perhaps the one at the top”. Failure on part of a government hospital to provide patients with timely medical treatment is a sign of the violation of patients’ right to life, as laid down in *Paschim Banga Khet Mazdoor Samity & Ors. v. State of West Bengal & Anr.*⁹⁹²

From these judicial pronouncements it is clear that the Supreme Court stands by the citizens’ right to health. In light of this fact, it becomes all the more essential for the nation to have a public health law that accounts for the Government’s responsibility to preserve public health and provide all the basic healthcare facilities required in the times of a crisis like the spread of coronavirus – such as an adequate testing facilities and sufficient personal protective equipment (PPE) kits provided to healthcare workers. To have a properly formulated law in this regard would ensure a more structured response to the situation from all aspects. Recent decisions and directions issued by High Courts and the Supreme Court to the government have played a key role in providing guidance to the executive. When an advisory was issued by the Government cautioning against mass gatherings to prevent the spread of the infection, the SC put out a circular of precautionary measures to be followed, including the usage of alcohol-based sanitizers and thermal-screening.⁹⁹³ The Court has supported the lockdown provisions by rejecting a petition by a former Director-General of Police from Uttar Pradesh to quash FIRs registered against ordinary citizens for violating lockdown rules.⁹⁹⁴ They have contributed in the fights against the virus by taking *suomoto* action by issuing notices to various states to decongest jails and other correctional institutions.⁹⁹⁵

However, courts have also chosen to remain silent on certain key issues, in which regards their inputs would have been very valuable, such as the rights and remedies to be made available to migrant workers during this crisis. This is telling of an institutional failure in the

WORDS SPEAK

⁹⁹² AIR 1996 SC 2426 at 2429 para 9.

⁹⁹³ Deepak Jain, *Circular*, SUPREME COURT OF INDIA (Mar. 14, 2020), obtained from https://main.sci.gov.in/pdf/Notice/14032020_093925.pdf.

⁹⁹⁴ Legal Correspondant, *Coronavirus | Supreme Court rejects plea to quash cases against lockdown violators*, THE HINDU (MAY 05, 2020), <https://www.thehindu.com/news/national/coronavirus-supreme-court-rejects-plea-to-quash-cases-against-lockdown-violators/article31512423.ece>.

⁹⁹⁵ Shruti Mahajan, *CoronaVirus: Supreme Court takes up issue of overcrowding in prisons, seeks suggestions for prevention*, BAR AND BENCH (MAR. 16, 2020, 1:40 PM), <https://www.barandbench.com/news/litigation/coronavirus-supreme-court-takes-up-issue-of-overcrowding-in-prisons-issues-show-cause-notice-for-suggestions-for-prevention-from-states>.

judicial mechanism.⁹⁹⁶ In other contexts, the SC has given inconsistent decisions, or has changed its pronouncements, leaving the nation in perplexity. For instance, the Court initially ordered free testing for COVID-19, calling it a humanitarian issue. Yet, when private laboratories objected by saying that they were unable to recover costs, the Court within one week changed its decision, saying that free tests would be available only to the poorest.⁹⁹⁷ The nation now desires more *suo moto* initiatives from the judiciary, and less deference to the executive.

THE DIRECTIVE PRINCIPLES OF STATE POLICY

Although the importance of public health is not explicitly acknowledged under Article 21, it has unequivocally been recognised in the Directive Principles of State Policy (DPSPs) under part IV of the Constitution. Article 38 imposes the liability on the State to secure a social order for the promotion of welfare of the people,⁹⁹⁸ of which public health and affordable healthcare are indispensable aspects. Article 39(e) relates to the protection of the ‘health and strength’ of workers, men and women.⁹⁹⁹ Article 41 recommends that the State ‘*public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want*’¹⁰⁰⁰ which effectively requires the state to take all possible measures within its capacity to assist those who are affected by a public health emergency such as the novel corona virus. The health of a mother must be taken care of with the granting of maternity leave as per Article 42.¹⁰⁰¹ Moreover, “*raising of the level of nutrition and the standard of living of its people and the improvement of public health*”¹⁰⁰² have been established by Article 47 among the primary duties of the State.

Although DPSPs are not enforceable in the courts, they hold a powerful persuasive value in the policies of the government. It is essential to note that a number of DPSPs regarding health have already been given legal effect. For instance, The Maternity Benefit (Amendment) Act,

⁹⁹⁶ Mihir Desai, *Covid-19 And The Indian Supreme Court*, BLOOMBERG QUINT (May 28, 2020, 6:05 PM), <https://www.bloombergquint.com/coronavirus-outbreak/covid-19-and-the-indian-supreme-court>

⁹⁹⁷ Anindita Sanyal, *Coronavirus - Free Coronavirus Testing Only For Poor, Says Supreme Court*, NDTV (Apr. 13, 2020, 07:15 PM), <https://www.ndtv.com/india-news/free-covid-19-testing-only-for-poor-says-supreme-court-gives-option-to-centre-to-add-more-categories-2211061>.

⁹⁹⁸ INDIA CONST. art. 38, cl. 1.

⁹⁹⁹ INDIA CONST. art. 39, cl. e.

¹⁰⁰⁰ INDIA CONST. art. 41.

¹⁰⁰¹ INDIA CONST. art. 41.

¹⁰⁰² INDIA CONST. art. 42.

2017¹⁰⁰³ has been enacted to actualise Article 42. This legislation provides maternity leave, or full paid absence from work, for a period of 26 weeks to ensure the health of the mother as well as the child. In keeping with Article 47, the Government of India under its Expanded Programme of Immunization (EPI) provides vaccinations, to prevent seven vaccine-preventable diseases.¹⁰⁰⁴ Some of these vaccines are mandatory in childhood, ensuring that no child is denied its benefit.¹⁰⁰⁵ Another example to be cited is that the Central Board of Secondary Education (CBSE) has formulated new guidelines for its schools, mandating them to have a daily sports period in order to ensure the continued health and fitness of all students.¹⁰⁰⁶

Thereby is it clear that the constitutional as well as judicial recognition of the importance of public health and health rights in India must be supplemented with a consolidated law to the same effect.

PUBLIC HEALTH LAWS: PRESENT SCENARIO

Public health law, broadly defined, includes laws which are intended as health interventions, laws that define the powers, duties and boundaries of health agencies and systems, and laws that have an impact on health but were not enacted with population health in mind.¹⁰⁰⁷ The enactment of a public health law is the most critical legal need, including emergency preparedness, at the national level. This must be formulated with the incorporation of legal as well as scientific expertise in public health law.

The World Health Organisation has emphasised the need for robust health infrastructure in every country as the most effective long-term preparedness strategy for global health emergencies such as the outbreak of Corona virus. This includes within itself the legal infrastructure – laws and policies that empower obligate and limit government and private

¹⁰⁰³ No. 6 of 2017.

¹⁰⁰⁴ Retrieved from: <http://www.nrhmp.gov.in/content/immunisation>.

¹⁰⁰⁵ Mahak Arora, *Optional & Mandatory Vaccines for Babies and Children in India*, FIRSTCRY PARENTING (Aug. 20, 2018), <https://parenting.firstcry.com/articles/optional-and-mandatory-vaccines-for-children-in-india/>.

¹⁰⁰⁶ Anon., *CBSE's new guidelines direct schools to have mandatory 'sports period' every day to prevent students from turning into couch potatoes*, THE NEW INDIAN EXPRESS (Apr. 22, 2018, 04:02 PM), <https://www.newindianexpress.com/nation/2018/apr/22/cbse-new-guidelines-direct-schools-to-have-mandatory-sports-period-every-day-to-prevent-students-1804934.html#:~:text=According%20to%20the%20new%20guidelines,be%20graded%20on%20the%20same.>

¹⁰⁰⁷ Scott Burris et al., *Making the Case for Laws That Improve Health: A Framework for Public Health Law Research*, Vol. 88 Issue 2, THE MILBANK QUARTERLY, 169, (2010).

action concerning health.¹⁰⁰⁸ Such laws are required to govern a wide range of necessary executive actions such as disease reporting, surveillance, quarantine, social distancing, curfews; whilst simultaneously safeguarding the rights of those infected or otherwise affected (including medical professionals) by such a catastrophic outbreak.

In response to the outbreak of the novel corona virus, the Indian government has invoked two laws: (i) the Epidemic Diseases Act, 1897; and (ii) the Disaster Management Act, 2005. The Epidemic Diseases Act is to be read along with the Epidemic Diseases (Amendment) Ordinance, 2020¹⁰⁰⁹ as well as various provisions of the Indian Penal Code.¹⁰¹⁰ However, these have all proved inadequate in solving the crisis, as the number of positive cases has continued to rise steadily.¹⁰¹¹ Meanwhile, the desired goal of ‘flattening the curve’ (a public health strategy to slow down the rate of spreading of SARS-CoV-2) remains a distant aspiration.¹⁰¹² It thus becomes necessary to analyse the laws and regulations being implemented presently in order to understand why they are proving insufficient, in order to make necessary changes by formulating a new and consolidated public health law.

On 11 March 2020, the Indian Central government advised all States to invoke the necessary provisions of **the Epidemic Diseases Act, 1897**¹⁰¹³ to enforce all advisories to combat the pandemic.¹⁰¹⁴ This Act is read along with the Epidemic Diseases (Amendment) Ordinance, 2020 which was promulgated on 22 April, 2020.¹⁰¹⁵ The Act comprises of only four sections, and was first enacted 123 years ago in colonised India, to combat the spread of the bubonic

¹⁰⁰⁸ G eralaine Marks-Sultan et al, *National public health law: a role for WHO in capacity-building and promoting transparency*, BULLETIN OF THE WORLD HEALTH ORGANIZATION (May 03, 2016), <https://www.who.int/bulletin/volumes/94/7/15-164749/en/>.

¹⁰⁰⁹ No. 5, Ordinance of President, 2020.

¹⁰¹⁰ No. 45 of 1860.

¹⁰¹¹ Anon., *Covid-19: New infections rise in India but rate of doubling slows*, THE TIMES OF INDIA (Apr. 20, 2020, 05:36 AM), <https://timesofindia.indiatimes.com/india/though-coronavirus-cases-rising-in-india-the-rate-of-increase-is-stabilising-shows-data/articleshow/75248459.cms>.

¹⁰¹² Manish Tewari, *Lockdown Has Not Flattened Covid-19 Curve, But Bent The Economy*, OUTLOOK (May 02, 2020), <https://www.outlookindia.com/website/story/opinion-the-lockdown-has-not-flattened-covid-19-curve-but-bent-the-economy/351947>.

¹⁰¹³ No. 3 of 1897.

¹⁰¹⁴ Anon., *What is 1897 Epidemic Act that Centre wants states to invoke to tackle coronavirus*, HINDUSTANTIMES (MAY 12, 2020, 12:36 PM), <https://www.hindustantimes.com/india-news/what-is-1897-epidemic-act-which-government-proposes-to-invoke-to-tackle-coronavirus/story-A063TFRmF8bDobyG0kB0qL.html>.

¹⁰¹⁵ Anon., *The Epidemic Diseases (Amendment) Ordinance, 2020*, PRS LEGISLATIVE RESEARCH, <https://www.prsindia.org/billtrack/epidemic-diseases-amendment-ordinance-2020>.

plague in erstwhile Bombay.¹⁰¹⁶ The Ordinance amends this Act to include protective provisions for healthcare personnel combating epidemic diseases, while expanding the powers of the central government to control the spread of the virus.

This law authorises state governments to take exceptional measures and prescribe regulations that are to be observed in order to limit the spread of the disease, if the ordinary provisions are deemed insufficient for this purpose.¹⁰¹⁷ In keeping with this section, certain states have used this discretionary power to implement regulations in their respective domains; for example – The Himachal Pradesh Epidemic Disease (COVID–19) Regulations, 2020, The Delhi Epidemic Diseases COVID–19 Regulations, 2020, and The Maharashtra COVID–19 Regulations, 2020.¹⁰¹⁸ As various states have felt the impact of the virus in differing magnitudes, it is pertinent for different states to determine the necessary regulations accordingly. As per the Seventh schedule of the Indian Constitution, public health is a subject in the state list.¹⁰¹⁹ However, as per an amendment to the Act in 1920, even the central government may prescribe certain regulations for the inspection of any ship or vessel leaving or arriving at any port when concerned that any part or the entire country is threatened with the outbreak of an epidemic disease.¹⁰²⁰

The Act also includes a penalty clause which lays down that violation of or disobedience to any provision invoked under this Act shall be considered as an offence¹⁰²¹, punishable as per Section 188 of the Indian Penal Code (a penalty of a fine of Rs. 200 and/or simple imprisonment of one month for violating an order of a public servant, which may exceed to a fine of Rs 1,000 and imprisonment of six months in case the disobedience tends to cause danger to human life, health or safety¹⁰²²). Moreover, legal protection is granted to those officials or persons acting in good faith under this law.¹⁰²³ Additionally, **the Epidemic Diseases (Amendment) Ordinance, 2020** has been promulgated to include protections for healthcare personnel combating epidemic diseases, while expanding the powers of the central

¹⁰¹⁶ManaviKapur, *A 123-year-old law, once used to imprison freedom fighters, is India's primary weapon against coronavirus*, QUARTZ INDIA, (Mar. 23, 2020), <https://qz.com/india/1820143/india-battles-coronavirus-with-british-era-epidemic-diseases-act/>.

¹⁰¹⁷*Supra*.

¹⁰¹⁸SwagataYadavar&ApoorvaMandhani, *Modi govt is using two laws to tackle coronavirus spread. But one of them needs changes*, THE PRINT (Mar. 23, 2020, 1:48 PM), <https://theprint.in/theprint-essential/modi-govt-is-using-two-laws-to-tackle-coronavirus-spread-but-one-of-them-needs-changes/386052/>

¹⁰¹⁹INDIA CONST. art. 246.

¹⁰²⁰*Supra*.

¹⁰²¹*Supra*.

¹⁰²² Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860, §188.

¹⁰²³*Supra*.

government to prevent the spread of such diseases and providing for stricter punishments. Section 2A has been expanded to permit the Central Government to make regulations to inspect any bus, train, goods vehicle, ship, vessel or aircraft leaving from or arriving at any land port, port or aerodrome; and for the detention of anyone travelling therein.¹⁰²⁴ Section 1A is included with the amendment to define the terms “act of violence”, “healthcare service personnel” and “property”.¹⁰²⁵ It also includes Section 2B prohibiting any act of violence against healthcare service personnel, or causing any damage or loss to their property during an epidemic.¹⁰²⁶ Stringent punishments for such acts have also been provided for, and are cognizable and non-bailable under the newly inserted clause 3A¹⁰²⁷, which overrides the existing provisions of the Criminal Procedure code, and provides for an efficient, time-bound investigation.

On 11 March 2020, the Ministry of Home Affairs passed an order retrospectively invoking **the Disaster Management Act, 2005**¹⁰²⁸ (the DM Act) with effect from 17 January 2020. With this order, the Union Home Secretary (who is the chairman of the National Executive Committee) delegated power to the Union Health Secretary for the purpose of enhancing the preparedness for and containment of COVID-19.¹⁰²⁹ This law details the constitution of administrative authorities such as the National Disaster Management Authority; along with their powers, steps needed to be followed in a situation of disaster, penalties, and rules. It also contains provisions enabling the government to allocate resources for prevention and mitigation of disasters, capacity building and so on. The legislative intent of this Act was to “provide for the effective management of disasters”,¹⁰³⁰ which may be man-made or natural, and may possibly result in substantial loss of life, or human suffering. The DM Act establishes the National Disaster Management Authority (NDMA) as the nodal central body for co-ordinating disaster management, having the Prime Minister as its Chairperson. It enables the National Authority to lay down policies, plans and guidelines for management of

¹⁰²⁴ *Supra.*

¹⁰²⁵ *Supra.*

¹⁰²⁶ *Supra.*

¹⁰²⁷ *Supra.*

¹⁰²⁸ No. 53, Acts of Parliament, 2005.

¹⁰²⁹ *Supra.*

¹⁰³⁰ M.P. Ram Mohan & Jacob P. Alex, *COVID-19 and the ambit of the Disaster Management Act*, THE WEEK (Apr. 26, 2020, 5:11 PM), <https://www.theweek.in/news/india/2020/04/26/covid-19-and-the-ambit-of-the-disaster-management-act.html>

and timely response to disaster.¹⁰³¹ The NDMA has thus far formulated thirty guidelines on various disasters, including the 2019 National Disaster Management Plan, which is the broad legal framework within which Union and State governments are carrying out activities to contain COVID-19.¹⁰³² The DM Act bestows extensive powers on the Central Government, as well as on the NMDA. Irrespective of any law in force, the Central Government can (including over-riding powers¹⁰³³) issue any directions¹⁰³⁴ to any authority anywhere in India to facilitate or assist in disaster management.¹⁰³⁵ Any such directions must mandatorily be followed by the Union Ministries, State Governments and State Disaster Management Authorities. Those found violating its provisions are subject to civil and criminal liability. Moreover, the legislation allows certain financial freedom to tackle the rapidly spreading pandemic. By invoking this Act, the government has access to the National Disaster Response Fund (NDRF), and can now divert these funds to enhance medical facilities and research to contain the immediate concern over COVID-19.¹⁰³⁶

Chapter XIV of the Indian Penal Code¹⁰³⁷ deals with “*offences affecting the public health, safety, convenience, decency and morals.*” As per the provisions laid down in this chapter, disobedience to quarantine rule¹⁰³⁸ is a punishable offence – having the penalty of imprisonment for a term which may extend to six months, or with fine, or with both. Moreover, failure to take requisite precautions despite being aware of the possibility of the spread of such infection or disease is punishable. Whoever negligently¹⁰³⁹ or malignantly¹⁰⁴⁰ does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment, or fine, or both (imprisonment may extend to a period of six months if the act is negligent, and two years if it is malignant). Malignancy is characterized in diseases that are highly virulent, highly infectious and life-threatening. Disobeying or disregarding the prescribed norms for social distancing or social isolation, coughing or sneezing without covering the nose and mouth, not

¹⁰³¹ *Supra.*

¹⁰³² *Supra.*

¹⁰³³ *Supra.*

¹⁰³⁴ *Supra.*

¹⁰³⁵ *Supra.*

¹⁰³⁶ Tapes Kumar Singh, *A Critique On the Epidemic Diseases (Amendment) Ordinance, 2020*, LIVE LAW (Apr. 27, 2020, 9:00 AM), <https://www.financialexpress.com/india-news/disaster-management-act-centre-invokes-law-to-put-onus-of-enforcing-lockdown-on-district-officials-why-it-matters/1913346/>

¹⁰³⁷ No. 45, Acts of Parliament, 1860.

¹⁰³⁸ *Supra.*

¹⁰³⁹ *Supra.*

¹⁰⁴⁰ *Supra.*

wearing masks in public, loitering on the streets in groups, etc. are all considered to be punishable offences under the ambit of Section 270.¹⁰⁴¹

In addition to the IPC, the lockdown rules are facilitated by **Section 144 of the CrPC**¹⁰⁴² which pertains to unlawful assembly. In various states of India, the government has imposed Section 144 in order to maximize public safety and minimize the threat of corona virus. It is imposed in a given region in situations bearing urgency, or cases of nuisance or perceived danger of some event that has the potential to damage human lives or property.¹⁰⁴³ As per the orders under this section, public gatherings of more than five persons are restricted. In order to counter the rapid spreading of COVID-19, and to strengthen social distancing, S. 144 has been imposed in several districts of Maharashtra, Rajasthan, Andhra Pradesh, Tamil Nadu and more.¹⁰⁴⁴

LACUNAE IN THE EXISTING LEGAL FRAMEWORK

While the laws invoked by the Government may have played some role in the slowing of the spread of SARS-CoV-2, these measures are grossly inadequate in light of the magnitude of the present crisis. The Epidemic Diseases Act, a 123-year-old legislation, is merely regulatory in nature, and does not address the multi-faceted dimensions of public health issues of India. The Act fails to define key terms such as “dangerous”, “epidemic”. “Pandemic”. Even the amending ordinance overlooks the want for such definitions. The act is short and archaic, and lays down no provisions for the betterment of public health at large, and legal experts have said the Act does not reflect the realities of the spread of disease in the modern world, nor does it cover the framework to effectively respond to the outbreak. Additionally, many health and legal experts have described the legislation as draconian and outdated.¹⁰⁴⁵

The law is Pre-Constitutional and confers powers in the central and the state governments to take sweeping actions. This is deeply problematic because the law was written before fundamental rights were constitutionally provided for, and therefore did not take such

¹⁰⁴¹ Vageshwari Deswal, *Covid-19: Laws related to quarantine in India*, THE TIMES OF INDIA (Mar. 26, 2020, 5:50 PM), <https://timesofindia.indiatimes.com/blogs/legally-speaking/covid-19-law-related-to-quarantine-in-india/>.

¹⁰⁴² The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1974.

¹⁰⁴³ Shikha Goyal, *COVID-19: What is Section 144 of the CrPC?*, JAGRAN JOSH (Mar. 24, 2020, 11:49 AM), <https://www.jagranjosh.com/general-knowledge/difference-between-curfew-and-section-144-of-crpc-1550822290-1>

¹⁰⁴⁴ *Id.*

¹⁰⁴⁵ *Supra*,

fundamental rights into consideration. It is thus not in consonance with Article 13, which provides that laws inconsistent with or in derogation of the fundamental rights are void.¹⁰⁴⁶ Even the Epidemic Diseases (Amendment) Ordinance, 2020 does not enlist provisions to make good the right of the citizens, but rather simply confers more power in the hands of the government and makes penalties more stringent, although it does advance the protection of healthcare workers. There is no underlying delineation of the fundamental principles of human rights that the state must observe even during the implementation of emergency measures such as quarantine, while in an epidemic. Therefore, while only the powers of the central and state governments during the epidemic are clearly established, the nature and extent of the government's duties in preventing and controlling the epidemic have not been described.¹⁰⁴⁷

While the Epidemic Diseases Act puts too much focus on the powers of the government in preventing and controlling epidemics, it does not explicitly lay down any scientifically backed steps for the government to take in the abatement of a disease. Additionally, there exists no standard framework establishing the specific conditions under which states can take certain actions (such as curtailing the rights of the citizens), for what durations, and the measures to be taken in order to ensure that the masses continue to have access to basic essentials such as food, clean drinking water, and hygienic living conditions.

The Epidemic Diseases Act, despite amendments made via an ordinance, holds tremendous scope for misuse. Aside from there being no explicit reference to the human rights principles or ethical aspects applicable while in response to an epidemic outbreak; the act is also entirely silent on the question of availability and distribution of vaccines, curative drugs, testing kits and accessibility of other healthcare requirements.¹⁰⁴⁸

Another important point to be given due notice is the current and pressing issue of migrant labourers who are unable to return to their native places in times of health crises, lockdown and quarantine. They are trapped in their places of work, often without adequate resources for survival. In many cases there have been attempts at reverse-migration, but in want of the means to get from one place to another, multitudes of labourers have perished in the quest to go home. They are legally entitled to a journey allowance both for the outward and return

¹⁰⁴⁶INDIA CONST. art. 13.

¹⁰⁴⁷Manish Tewari, *India's Fight Against Health Emergencies: In Search of a Legal Architecture*, ORF ISSUE BRIEF, Mar. 2020.

¹⁰⁴⁸*Supra*,

journeys between their places of work and residence.¹⁰⁴⁹ However, they have in most cases not received any such assistance in reaching their places of residence. They have thus resorted to desperate measures such as walking or cycling thousands of kilometres, and many have died in transit.¹⁰⁵⁰

The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979¹⁰⁵¹ was enacted to regulate the employment and to improve working conditions of migrant workers in India. However, the legislation contains absolutely no provisions for their rights to healthcare. Legislative action is urgently needed to provide a sustainable balance between providing assistance to those who are helpless, and preventing any further cases of the disease being spread owing to desperate reverse-migration occurring without sufficient precautions being observed.

Aside from the Epidemic Diseases Act, even the Disaster Management Act, 2005 has proved to be completely inadequate at formulating nationwide measures to address the Covid-19 pandemic. It has no provision for the declaration of a disaster, for disaster-prone zones, the specifications of which health challenges and at what magnitude would classify as a disaster, and the geographical classification of disasters (whether regional or national) which might help in the assessment of damages.¹⁰⁵²

The DM Act provides for the establishment of a number of statutory authorities such as the disaster management authorities at national, state and district levels, advisory committees, executive committees and so on. The establishment of so many authorities and committees lack a strong, logical foundation. The creation of such committees has not been done with adequate inclusion of healthcare workers, medical experts or scientists. The overlapping of duties found among various authorities creates ambiguity; and the coordination among the bodies is a cumbersome process.¹⁰⁵³

There also exists an asymmetry in the power between the centre and the states, which is mediated by the DMA, thus putting forth the impression that the crisis situation is taken as an

¹⁰⁴⁹The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979, No. 30, Acts of Parliament, 1979 §15.

¹⁰⁵⁰RohiniCatterji, *Migrant Workers Have Died Almost Every Day Since May 8 Aurangabad Tragedy*, HUFFPOST(May 15, 2020, 1:21 PM), https://www.huffingtonpost.in/entry/migrant-workers-killed-lockdown_in_5ebcfd9bc5b63dbb671141d8.

¹⁰⁵¹No. 30, Acts of Parliament, 1979.

¹⁰⁵²Editorial, *COVID-19 and National Disaster Management Act*, Vol. 55, Issue No. 19, EPW, (2020) <https://www.epw.in/journal/2020/19/editorials/covid-19-and-national-disaster-management-act.html>

¹⁰⁵³*Id.*

opportunity to centralise power; with failures at the Centre leaving the states scrambling fervently to find ways to manage the outbreak of the disease. The Act also overlooks the involvement of local authorities and their role in mitigating a disaster, even though no disaster can be effectively dealt with only through the administrative set-up, while alienating the community as a whole.¹⁰⁵⁴ Essentially, it fails in providing specific measures that can be taken to abate a public health disaster, such as the spread of highly contagious diseases. All in all, even this Act falls short of expectations and would benefit from a carefully formulated amendment. It has been made clear herein that the legal framework being used by the Government at present to fall back on as a response to the outbreak of COVID-19 is riddled with multi-faceted inadequacies. Owing to these various lacunae in the law, a number of problems have remained unresolved. These primarily include the problems faced by migrant workers and victims of domestic violence, disobedience to the lockdown rules, insufficient number of tests being conducted per day, and the continued rise in the number of COVID-19 cases at an increasing rate. The pandemic is a complex problem that relates primarily to public health, but also to the economy, the society, and the rights of the masses. The problem requires a modern solution to be conceptualised and implemented at the earliest, which will account for these lacunae while reducing the suffering of those affected by the pandemic to the greatest extent possible. A consolidated public health law will go a long way in addressing these existing inadequacies under the present legal framework.

RECOMMENDATIONS AND CONCLUSION

The present legislative framework is clearly insufficient to govern the nation's requirements in response to the COVID-19 health crisis. Therefore, the most crucial recommendation put forth via this paper is the formulation of a consolidated public health law in India. Furthermore, the following points are to be taken into consideration for the formulation of one overarching law. Relevant aspects of various laws that have currently been invoked must be identified and consolidated. This will allow for the best aspects of each of the legislations to be given their due, without incorporating any of the provisions which have ceased to hold relevance in contemporary times. Any gaps in the said amalgamation must be made up for with additional provisions as may be required. The legislators must seek and take into

¹⁰⁵⁴Subhradipta Sarkar & Archana Sarma, *Disaster Management Act, 2005: A Disaster in Waiting?*, Vol. 41, No. 35, EPW, 3760-3763 (2006).

consideration the opinions of those having legal as well as scientific expertise in the field of public health law.

It is of the utmost essentiality that an Act of Parliament explicitly defines all key terms related to the matter being legislated upon. In this case, words like “pandemic”, “epidemic”, “health crisis” would have to be clearly explained and categorised. Segregations must also be made between regional and national health crises, along with clarifications as to immediate as well as subsequent measures to be implemented in each scenario. All fathomable lacunae in the present legal scenario must be addressed with the most effective remedies possible.

The roles of the Centre and the states must be clearly spelled out in order to minimise potential conflict or overlapping of power. It is also recommended that health, which is currently a state subject, be put on the concurrent list so that both the Centre and states can have a role in policy implementation and changes. This is in keeping with the recommendations made by a committee constituted by the 15th Finance Commission.¹⁰⁵⁵ The extent of executive power must be spelt out and limited, to prevent executive overreach and misuse. The assistance and involvement of local communities must be solicited, as community involvement and the role of local authorities is indispensable in the mitigation of a public health disaster.

In the process of formulating a single public health law for India, an example may be drawn out of the books of advanced democratic countries having similar laws. For example, the National Health Security Act, 2007 in Australia lays down processes and structures to preempt, prevent and deal with national health emergencies. The Public Health (Control of Disease) Act of 1984 in the United Kingdom was brought into force with the aim of creating specific functions for different authorities while responding to any national health emergency. An unambiguous hierarchical chain is established within which the primary, secondary and tertiary responders need to operate when dealing with a health challenge. In the United States, the Public Health Services Act, 1944 facilitates necessary action and creates an administrative framework within which public health emergencies may be channelled.¹⁰⁵⁶

It is strongly recommended that the proposed consolidated public health law strikes a healthy balance between the administration and the welfare of the masses. The present legislative framework includes a multitude of provisions laying down the powers held by various

¹⁰⁵⁵ Anon., *Healthcare Should Be Made a Fundamental Right: Government Panel*, THE WIRE (Sep. 04, 2019), <https://thewire.in/health/healthcare-should-be-made-a-fundamental-right-government-panel>

¹⁰⁵⁶ *Supra*.

administrative bodies, and the various penalties to be imposed on erring individuals in times of a disaster. At the same time, accountability of public authorities is an essential element to be included in the formulation of a democratically acceptable law. While the executive must have the powers needed to fulfil its obligations in managing a health crisis, it must also be held accountable for its actions by the judiciary and the public at large.

The government must be required to account for, and make known to the public, measures taken to mitigate the effects of a public health crisis, funds spent in pursuit of the same, and so on. There must be a certain degree of transparency in the system to ensure continued faith in the government. The law must also clearly establish the consequences of failure of public authorities in the performance on their duties, and the punishments to be meted out to them in such cases. It is further recommended in keeping with the tenets of democratic governance that the said law is subject to judicial review, and is reviewed by specialised committees from time to time in order to be scrutinised for gaps, and amended if necessary.

It is also imperative to codify the rights of citizens with regard to public health. Access to free or subsidised healthcare, to protection from disease, the provision of tests and vaccinations, the access to essential goods and services are certain rights that must be assured to all. Free medical facilities must be provided to all those infected by a pandemic, especially those from lower income backgrounds. These facilities must mandatorily include free testing, treatment, vaccination (if it is available), meals and hygienic conditions, with the onus largely resting on the government to ensure that all citizens are allowed such facilities.

Given the extremely essential nature of public health facilities, there must be no person exempted from its benefits. Health is not the privilege of the few, but the right of every individual. Therefore, it must be ensured that healthcare facilities are not monopolised by the most affluent classes. All those who cannot afford to pay for it must be given access to essential public health facilities for free or at subsidised rates.

The role of private healthcare institutions in providing free or subsidised services during this pandemic must be made proportionate to its dominant presence, as well as to its call of duty. The private sector must contribute in the fight against corona virus, to relieve the burden on public hospitals. Private and charitable hospitals must play their role in these pressing times to provide free or subsidised health facilities. Those healthcare institutes which enjoy free

land or subsidies must be directed to provide cost effective treatment to COVID-19 patients during this health crisis.¹⁰⁵⁷

Finally, the law must also incorporate post COVID-19 measures for public health to help the affected citizens recover from the aftermath of the disaster, and also to prepare the country as best as possible for any future health catastrophes of this enormity. Preventive as well as curative measures must be taken. Better public health infrastructure and more public awareness will prevent future epidemics from reaching such a magnitude again. More research into the development of a vaccine, hygienic quarantine zones etc. will hasten the rate of recovery.

To conclude, the outbreak of the corona virus pandemic is a deeply complex problem. The solution to it must be carefully thought out, keeping in mind the interests of all major stakeholders including those infected with the virus and their caregivers, those financially affected by the crisis, healthcare workers, and the government (among other stakeholders). A single overarching legislation amalgamating all the existing provisions from various existing laws will provide much desired structure and clarity, and enable better handling of health crises not only in terms of COVID-19, but also regarding public health disasters that may occur in the future.

WORDS SPEAK

¹⁰⁵⁷PrasannaMohanty, *Coronavirus Lockdown XI: Why India's health policy needs a course correction*, BUSINESS TODAY (Apr. 29, 08:06 PM), <https://www.businesstoday.in/current/economy-politics/coronavirus-lockdown-covid-19-india-health-policy-healthcare-private-hospitals/story/402405.html>.